

A New Castle City Board of Adjustment Hearing (Continuance) took place on January 17, 2007 at 7 p.m. in the City of New Castle's Town Hall.

Present: Mayor John F. Klingmeyer
James F. Harker, City Solicitor
David Athey, City Engineer

Mayor Klingmeyer called the meeting to order at 7:05 p.m. He introduced City Solicitor James Harker and City Engineer David Athey.

The Mayor read the Notice of Public Hearing that states, "An application has been filed by Regina Marini for property located at 101 West Third Street, New Castle, Delaware, parcel number 21-018.00-009, seeking an interpretation of the city code and/or a variance from the required 25 foot minimum rear yard setback to allow construction of a residential dwelling 2 feet, 6 inches from the rear property line. For the purpose of considering this application, the Board of Adjustment will continue a public hearing on January 17, 2007 at 7 p.m. in Old Town Hall, 2nd floor, located at 201 Delaware Street, New Castle, Delaware.

Notices were advertised in the News Journal and New Castle Weekly papers. Mr. Jeff Bergstrom, City Inspector, confirmed that the property has been properly posted.

Mr. Harker addressed an email he had received on 12/19/06 from Mr. John Wheeler. He has received additional emails from the same party attempting to provide arguments/evidence in a matter pending before the Board of Adjustment and requesting his recusal and the Mayor's recusal. This practice is inappropriate for a Delaware attorney. Mr. Harker is responding to the 12/19/06 email tonight, a public hearing. The 12/19/06 email will be placed in the record along with Mr. Harker's statement. (*Mr. Harker read the email aloud and addressed its contents.*) He further offered there is no legal or factual basis for his recusal from this Board and to do so would be to shirk his statutory responsibility to serve as a member of this Board and the citizens of New Castle in that capacity.

The Mayor agrees with the City Solicitor's comments and stated he complies legally with requirements for this Board and, therefore, refused to recuse himself from this Board.

Mr. Harker referred to another email dated 12/20/06 from Mr. Wheeler regarding the reconsideration of the decision of the actions taken by the Board of 11/29/06 to postpone a hearing until January. To his knowledge none of the emails have been sent by Mr. Wheeler to the applicant or her counsel. (*He read this email aloud and addressed accordingly.*) In his email, Mr. Wheeler suggests postponing this hearing until a later date. Mr. Harker advised that if this Board agrees that a postponement is necessary that a motion should be made and seconded, discussion would follow including the applicant or any other interested party and a vote taken. No motion was presented.

No further outline of this request was presented by Mr. Bergstrom since it is already before the Board.

Mr. John Tracey, counsel for property owner Regina Marini, introduced himself along with Todd Breck of the engineer/architect firm The Breckstone Group. He addressed several points raised in the emails, which he did not receive. He stated for the record regarding the allegation of illegal demolition that his client has never been formally charged or accused with illegally demolishing the property by the city. This fact has been confirmed with Messrs. Bergstrom and Harker. This property is zoned Historic Residential; therefore, the size it will be and what it will look like rests with the Historic Area Commission (HAC). We appeared before the HAC in September 2006 to receive approval of proposed setbacks; that approval was granted. There was a question as to what street is to be considered the street yard and what is considered the rear yard to determine whether a variance is necessary. HAC confirmed the historic orientation of the house was on South Street and endorsed setbacks shown to them which is approximately six feet (6') from South Street, approximately one foot (1') off Third Street and approximately two and one-half feet (2-1/2') off of Battery Park. The subject of sidewalks is not an issue because they are not seeking to build outside the established property lines. Per Mr. Bergstrom's suggestion he sent a letter after the HAC meeting to possibly taking two to three feet (2'-3') off our property on the Third Street side and exchanging it for two to three feet (2'-3') of property on the Battery Park side so the same lot size would be maintained but additional area would exist along Third Street for construction of sidewalks. A response has not been received to date. This is a private building lot; it has never been owned by the city or Trustees or is it part of the park.

(Ms. Marini and Mr. Breck were sworn in by the Mayor.) Ms. Marini gave testimony of circumstances surrounding her purchase of the house. She did receive a demolition permit with the intent of preserving the front façade and as much of the structure as possible. She was instructed that she had to demolish the condemned portion of the house and have it removed from the property. A professional company was removing the debris when the entire house collapsed.

Mr. Tracey presented photographs and a survey showing the house was oriented towards South Street. The original stairs to the front of the house still exist on the property extending up from South Street towards where the house existed. A building permit was requested immediately following demolition to construct a new home. We were advised at that time the property was zoned Open Space Recreation (OSR). We went to the Board of Adjustment to get a determination as to what the proper zoning was for the property. Written decision of 10/1/98 states it was determined it was a residential building lot in the city of New Castle and it was zoned Historic Residential. It was learned that zoning maps being adopted by the city of New Castle in 2003-04 were still listing the property as OSR. As a result they returned to the city to correct that error in the maps. The map was corrected to show Historic Residential. He presented a drawing of what the house will look like. HAC asked them to make some revisions to the proposed plans which they incorporated before appearing before them in

September. We are treating South Street as the front yard meaning the line opposite of it would represent the rear yard, Third Street and Battery Park would provide the side yards. The setback we requested from HAC was approximately six feet (6') off South Street, approx. two and one-half feet (2-1/2') off Battery Park and approx. one foot (1') off Third Street. HAC endorsed those setbacks but did not endorse the house because they wanted to see additional changes. Also a dispute arose concerning what should be considered the rear yard and we were directed to appear before the Board of Adjustment.

It is their position that South Street should be considered the front yard and Third Street would be the side yard. If South Street is determined to be the front yard no variances are necessary for this application. If it is determined that Third Street is considered the front yard we are required to seek a variance from the rear yard setback requirements. *(Discussion about the distance of the old house from the line dividing the lot and Battery Park took place.)*

The property is located on the corner of South Street and Third Street. There is some question about whether South Street is a public street. Mr. Tracey provided two maps from 1868 showing the house fronting South and Third Streets.

He provided four deeds dating to 1863 that all reference the existence of South Street and describe the property along the lines of South Street. None of the deeds reference South Street as either unopened or vacated. He said he found no law or ordinance indicating that South Street had been vacated. South Street remains a public paved right-of-way for public use providing access for recreational facilities in a paved parking lot in Battery Park as well as access for emergency vehicles via a gravel path down to the river. He has submitted a FOIA request to Mr. Harker requesting information on the status of South Street; no information was found one way or the other regarding the status of South Street.

(Mr. Tracey and Mr. Breck fielded questions concerning property dimensions from the Board.) Mr. Tracey said with approval to build they do not plan on putting anything outside of the existing property lines. The Mayor asked if he knows where the front yard and front of the house/entrance of the original structure are located. He referred to the survey for the Shaw property which shows the existing stairs going down from the house to South Street; there is no entrance from the house to Third Street. Ms. Marini provided additional detail about photos, Exhibits 3, 4 and 5. She confirmed that the front door was located on South Street.

(Mr. John Wheeler was sworn in by the Mayor.) Mr. Wheeler stated he has relied on statements made by the city for over five years that South Street is vacated. He further stated they had filed a FOIA asking about the status on South Street

and has not received a response. He asked for a continuance on this issue to allow citizens to organize evidence.

The Board decided to discuss the status of South Street. **Mr. Athey moved to separate the variance requested and allow public comment (on whether or not South Street is a public right-of-way or street) at this time. Mr. Harker seconded the motion.** If South Street is determined by this Board to be a public street no variance is required for a rear yard setback. **The motion was passed unanimously.** The Mayor called for a recess.

The floor was opened for comments. No comments were made in favor of the variance application.

Michael J. Alfree, Sr., 203 Harmony Street (sworn in by the Mayor), representing the Trustees of New Castle Common, voiced their opposition to the variance application presented for the property located at 101 West Third Street. It is the position of the Trust that because South Street beyond the intersection of West Third Street has not been used as an actual street for more than 20 years, it is no longer a public street. It is their opinion that West Third Street is the public street which this property fronts. *(He further presented reasons supporting their opposition.)* He stated that the Battery Park parking area and by extension the access to Third Street is maintained by the Trustees and he understands the entire park has been turned over to the city. *(Mr. Alfree then answered questions from the Board.)* He asked that the city zoning map [2/10/04] hanging on the wall will be part of his testimony; the Board complied.)

Ned Hutchison, West Fourth Street (sworn in by the Mayor), said the parking lot was gravel until it was paved by the Trustees. The road going to the parking lot was muddy until gravel was put down; it is a public parking lot. He said there was an access to the Shaw property from Third Street. *(Mr. Hutchison then answered questions from the Board.)*

Bruce Gordon (sworn in by the Mayor), lives across the street from the property in question. The path extending South Street used to be a walking path, Third Street was paved down to the last property on the right-hand side. The access to 101 was on Third Street and there were two sets of steps; one to the middle of the house (length of the original section) and another set of steps to the back. *(Mr. Gordon fielded questions from the Board.)*

Mr. Wheeler asked for clarification on who the correct person would be to lay this before so that the investigation that is required can be done. Mr. Harker responded that it is not the Board of Adjustment and offered to provide his legal response to City Administrator Thomas and Mr. Wheeler can speak with her. Mr. Wheeler referred to the site drawing of the proposed house and questioned

the series of decisions that have been made and claims that false statements have been made. Mr. Harker offered that any proceedings that took place before the Board which were not appealed are final decisions of the Board and this Board is not going to revisit those decisions. He asked Mr. Wheeler to present relevant documents/proof to show that South Street is not a street or if it were ever a street that it was vacated. Mr. Wheeler said that citizens are not in a position to provide the evidence being requested and again asked for a continuance. Mr. Athey asked Mr. Wheeler to elaborate on his and other citizens belief that it has been the city's position until recently that that street has been vacated. Mr. Wheeler has had discussions with Mr. Bergstrom, but does not have his notes with him, that the street is vacated and it is not a corner lot. Mr. Athey suggested ample time has been afforded to gather evidence and asked what they will be able to do with additional time if we consider a continuation. He stated the same kind of work the petitioner has done and provided details including other citizens that can testify to what they know. Mr. Athey took issue with Mr. Wheeler's statement that a continuation would allow additional people to speak on this issue since this meeting was advertised. Mr. Wheeler feels that the issue of whether South Street is vacated is new and was not raised during the 11/29/06 meeting.

Elaine Pat_____, Deemer Mansion (sworn in by the Mayor), stated that in 1994 she walked to Bruce Gordon's home down South Street. She remembers the house and its condition at that time. She questions the petitioner's wish to rebuild the historic property based on the drawing presented. She suggested discussion on the footprint of the property. Mr. Harker responded that the style of the house, location of lot, and footprint go to HAC and are beyond this Board's jurisdiction. *(Ms. Pat_____ answered questions from the Board.)*

Susan Keyser (sworn in by the Mayor) feels it is important for the city to make a determination about who has title of the land (pathway) and investigation is needed. Mayor Klingmeyer addressed her comments and cited several streets that weren't used but when city plans were drawn up they were still considered streets. He added that the city's policy was consistent that it was a street even though it hadn't been used or even practical. Mr. Harker said there is no dispute over who owns the property; it is part of Battery Park which is owned by the city.

A member of the audience asked if the Board of Adjustment has any indication that South Street was vacated or if it still exists on the zoning map. Mr. Harker stated that the Board is a judicial body and are here to get evidence of that this evening.

Mr. Tracey offered rebuttal comments. *(Mr. Tracey and Ms. Marini addressed questions from the Board.)*

The Board then discussed whether it has heard sufficient evidence to make a decision or to continue the matter to allow further investigation and/or comment

by opponents to this issue. Mr. Athey moved to continue the hearing not to exceed three weeks and hopefully sooner. The motion died due to lack of a second. **Mr. Harker made a motion to consider the issue this evening of whether this is a corner lot or not. Mr. Athey seconded the motion which was approved unanimously.** Mr. Harker provided his reasons for considering this property a corner lot. Mr. Athey does not support some of Mr. Harker's comments and is not convinced the Board has reviewed all the evidence that may be forthcoming and may clarify the issue.

Mr. Harker made a motion that we decide the issue of whether this is a corner lot this evening; if we vote in favor of that there would be a second motion as to whether it is or is not a corner lot. If we vote against that motion we are prepared to hear the rest of Mr. Tracey's presentation of the remainder of the variance. Mayor Klingmeyer seconded the motion.

Mr. Harker believes that this Board is dedicated to making decisions on an issue on which several months have been afforded to gather evidence for the Board this evening. The greater weight of the testimony delivered tonight is in favor that it is a corner lot. Messrs. Harker and Klingmeyer voted in favor of deciding tonight whether it is or is not a corner lot; Mr. Athey opposed the motion. The motion carried 2-1.

Mr. Harker made a motion that the Board vote that South Street constitutes a public street making this lot a corner lot and no variance is necessary for a rear yard setback. Mr. Athey seconded the motion. Mr. Athey reluctantly supported the motion because the weight of the evidence is clearly in the applicant's favor and if we are not going to hear anything further the only decision he can make is based on what I have before me.

Mr. Wheeler approached the Board disputing that several months were afforded to gather information. He feels a new position of the city occurred after the 11/29/06 meeting and he asked for a reason why a continuation isn't being considered. Mr. Harker responded that the application submitted by Mr. Tracey contained all information.

Mr. Harker stated he is in favor of a determination that South Street is an existing public street making the property a corner lot thereby making the front of the house facing South Street and that no variance for a rear yard setback under the city's zoning code. He bases his decision on the evidence presented before the Board, several exhibits submitted (#2 shows the house's orientation on South Street), surveys have been done by licensed surveyors and all refer to the area as South Street, photographs and maps that show South Street dating back 100 years or more and the deeds that all refer to the lot facing onto South Street, and professionals who prepared deeds for surveyors indicated South Street was in existence and a public street.

Mr. Athey said that although the search could have been more extensive, there were surveys/maps presented that clearly show the right-of-way as being there and there was effort made to determine if there was evidence the street had been vacated and there is nothing clear to determine the claim it was vacated. There was no written documentation presented that would refute the applicant's position. He votes in favor of the motion.

Mayor Klingmeyer stated that the 1990 deed record indicates South Street, he doesn't doubt the proper address of the original house was on Third Street, historically the city has maintained that old streets that might be abandoned or not used we still retain a right to them, and in his tenure as Mayor vacating streets has been mostly non-existent. There is no doubt in his mind that South Street existed and was never vacated. This Board cannot prevent an owner from building on a lot. He votes in favor of the motion.

The motion was passed unanimously.

Mr. Harker thanked everyone for their input this evening. The Board's decision is final tonight but it is not final for purposes of appeal. Any citizen who wishes to appeal our decision has 30 days from the date the written opinion is filed with the Board. The writing will be filed in the office of the Board of Adjustments which is in the Mayor's Office. Anyone can get a copy of the decision through the City Office or Mr. Bergstrom.

Mr. Wheeler asked if an appeal is filed will the Board hold in advance the consideration of variance until the appeal is heard and decided. Mr. Harker suggested the answer is "probably not", although he is not giving legal advice as to what should be done with an application for stay. Mr. Harker further stated the matter needs to go before the HAC again because it is in an historic district so there will be other opportunities for citizens to address concerns about the size of the house, its use and so on.

(The applicant's counsel addressed some of the concerns residents had with potential changes to the proposed house.)

Mr. Harker made a motion to adjourn the hearing; Mr. Athey seconded the motion. The hearing was adjourned at 10:05 p.m.

Respectfully submitted,

Debbie Turner
Stenographer

Applicant Exhibits:

- 1) East Coast Survey dated 3/29/99
- 2) Mortgage Survey – Vandemark & Lynch, Inc. dated 10/30/90
- 3) Pictures of the house showing its condition – dated June, 1997
- 4) Pictures of the house showing its condition – dated June, 1997
- 5) Pictures of the house showing its condition – dated June, 1997
- 6) Document supporting the house as part of the National Register Survey done in the City of New Castle by NCC – mid-1970's
- 7) Board of Adjustment Letter dated 10/1/98
- 8) Letter from Mr. Tracey to Planning Commission dated 1/30/04
- 9) 1868 Street Map dated 1907
- 10) 1868 Map from City Library
- 11) 1932 Aerial Photo
- 12) 1940 DelDOT Aerial Photo
- 13) Deeds (1863, 1927, Shaw, Marini)
- 14) Photo that shows parking lot and access to parking lot and the application
- 15) Photo that shows the right-of-way
- 16) City zoning map dated 2/10/04
- 17) Photo of property in 1997